Comment on Recent Cases

ADMIRALTY: LIABILITY OF VESSEL IN REM WITHOUT FAULT BY HER OWNER.—In the Eugene F. Moran,[1] Mr. Justice Holmes characterized as a fiction which should not be extended, the doctrine of the China,[2] where it was held that a vessel, while being navigated by a compulsory pilot, was liable in rem for a collision arising solely through his negligence, even though the owner would not have been personally liable.

To consider a vessel as having capacity to do wrong is, of course, a method of thought that commends itself to the imagination rather than to the reason. If the law predicated wrongdoing as an essential of liability and then attributed wrongdoing to the inanimate object of a vessel, one could truly say that a liability so created was based on a fiction, but there is nothing fictitious in giving a man who suffers injury through the impact of an inanimate object the right to libel that object and have it sold to recoup his loss. The historical antecedents of the doctrine do not personify the ship as a wrongdoer.[3] To speak of the vessel as a wrongdoer is merely a colorful, if incorrect, way of declaring it to be the cause of the injury.[4] Whether or not the property of a man in no way in fault should be taken to satisfy the loss of another, equally innocent, caused by the impact of that property is a question to be decided on its own merits. To stigmatize a rule of liability in such cases as based on a fiction appeals to prejudice and not to common sense. The just rule can only be evolved upon an examination of the peculiar circumstances surrounding the maritime enterprise.

In the decision of Mr. Justice Holmes above referred to, it was held that the doctrine of the China did not govern the case

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[1] The Eugene F. Moran (1909) 212 U. S. 466, 53 L. Ed. 600, 29 Sup. Ct. Rep. 339.

[2] The China (1868) 7 Wall. 53, 19 L. Ed. 67.

[3] While the Roman Law (Dig. IX, 2, 29, §§ 2-4) recognized no liability for collision except in cases of fault and this theory apparently prevailed generally in the Mediterranean throughout the Middle Ages (cf. Consulat de la Mer, c. 158, 2 Pard. 179) nevertheless in the customs and codes of the west and north of Europe, there was a different rule in the case of fortuitous damage arising out of collision, (Oleron art. 15; Wisby arts 29, 30, 1 Pard. 481), and this rule was carried into the Ordonnance of 1681 (III, t. 7, arts. 10, 11, 4 Pard. 381). In none of these was the ship spoken of as a wrongdoer, as is shown by the earlier text of the laws of Oleron (1 Black Book 108), art. 15: *"Une nef est en ung convers amaree et estant a sa maree avec [sic] autre nef vient et fiert le nef qui est en sa paix, en telle maniere quelle est endommagee du coup que lautre nef luy donne et y a des vins enfondre dedens, le dommage doit estre apprisie et party par moitie entre les deux nefs et les vins qui sont dedens les deux nefs doivent partir du dommage entre les marchants. . . ."* See also Danjon, Traité de Droit Maritime, IV, § 1147.

[4] Cf. Gray, J., in Ralli v. Troop (1894) 157 U. S. 386, 402, 39 L. Ed. 742, 750, 15 Sup. Ct. Rep. 657, 663.

of a vessel brought into collision with another vessel by the negligence of the master of the tug which was towing it. He made the following distinction: "There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached."

Circuit Judge Woods of the Fourth Circuit in the recent case of *Wilmington Railway Bridge Co. v. Franco-Ottoman Shipping Company, Ltd.*,[5] has ignored this distinction. There the master of a tug was on the bridge of the Cromwell which was being towed by the tug through a drawbridge. The Cromwell sheered and herself ran into the bridge. The sheer was apparently due to the slow speed with which the Cromwell, at the direction of the master of the tug was proceeding, and was not directly due to any maneuven on the part of the tug. While it was found that there was no negligence and therefore a petition to limit liability was ailowed, the court held that in any event the Cromwell would not have been liable, since the injury would have been due to the negligence of the towing company, an independent contractor, for whose acts the Cromwell was not responsible. It would seem, however, that if there had been negligence it would be a case "where the harm is done by the mismanagement of the offending vessel" and the case would therefore have fallen within the scope of the China doctrine as limited by Mr. Justice Holmes.

This case represents an inclination on the part of courts to limit doctrines imposing liability on a ship in circumstances where the owner is not personally to blame. The doctrine has not been applied to cases of collision where no one was in fault.[6] It is perhaps safe to say that some one must be in fault, a departure from the ancient precedents, in which the doctrine originated. Even if the master was in fault, the doctrine was not applied to a conversion by him outside the scope of his authority,[7] a result directly opposed to the China. It has, however, been applied to a liability in rem for causing death under a state statute, in circumstances where the owner would not be personally liable.[8] It receives its broadest application in seizure cases.[9] Decisions that a demised vessel is liable in rem are instances of the application of a similar, if not the same, doctrine.[10] The principal case suggests that it does not apply to the torts of independent con-

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[5] (Circ. Ct. App., 4th Circ., Jan. 7, 1919) 259 Fed. 166.

[6] Stainback v. Rae (1852) 14 How. 532, 14 L. Ed. 530.

[7] The Dauntless (E. Dist. N. Y., 1881) 7 Fed. 366, dictum.

[8] Indra Line, Ltd. v. Palmetto Phosphate Co. (Circ. Ct. App. 4th Circ., 1916) 239 Fed. 94.

[9] Harmony v. The United States (The Malek Adhel) (1844) 2 How. 210, 11 L. Ed. 239.

[10] The Barnstable (1901) 181 U. S. 464, 45 L. Ed. 954, 21 Sup. Ct. Rep. 684.

tractors. The doctrine then is a very limited one, and seemingly of uncertain future.

It is suggested that in our consideration of it, we should do well to disabuse ourselves of the idea that it is based on a fiction, and that if we are tempted to regard it as inapt in these modern days, because speed and ease of communication, in lessening the differences in fact between land and water transportation, have lessened the reason for different rules of law, we should also remember that the power of vessels to cause crushing damage to other craft in the fairways of the ocean has enormously increased.

A. T. W.

ADMIRALTY: POWER OF THE STATES AND OF CONGRESS IN RESPECT THERETO.—To what extent a state may legislate on matters falling within the maritime law is still an open question, notwithstanding that the Constitution vests in the Supreme Court and inferior federal courts "all cases of admiralty and maritime jurisdiction"[1] and in the same courts by act of Congress "all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."[2]

The last case in which the Supreme Court has had occasion to deal with this question is *Union Fish Co. v. Errickson.*[3] Errickson libelled a schooner belonging to the Fish Company for breach of a maritime contract, made orally in California, whereby he had contracted to serve as master of the vessel for a period not less than one year. He was met by the defense that his oral contract was absolutely void under the state Statute of Frauds.[4] The court held (five to four) that a contract valid under the maritime law cannot be affected by a state statute and allowed recovery.

The decision at once raises the fundamental question, what is the maritime law? This is said to be the general system of maritime law which was familiar to lawyers and statesmen of the country when the Constitution was adopted.[5] To determine the

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[1] U. S. Const., Art. III, §2.

[2] Judicial Code, § 24, cl. 3, and since 1917, by the Johnson Amendment "to all claimants the rights and remedies under the Workmen's Compensation law of any state."

[3] (1919) 248 U. S. 309, 63 L. Ed., Adv. Op. 143, 39 Sup. Ct. Rep. 112. Annotated in 28 Yale Law Journal, 500 and 17 Michigan Law Review 591.

[4] Cal. Civ. Code, § 1624. This contention is in fact incorrect, as the California Statute of Frauds is procedural only and is waived unless particularly pleaded, or unless objection is taken to the evidence. Walberg v. Underwood (1919) 28 Cal. App. Dec. 351, 180 Pac. 55; Nunez v. Morgan (1888) 77 Cal. 427, 19 Pac. 753. The principal case might properly have turned on the rule that the admiralty courts are not bound to follow state statutes of procedure. The Key City (1871) 14 Wall. 653, 20 L. Ed. 896. The Supreme Court did not consider this point, but assumed that the contract was absolutely void by state law.

[5] The Lottawanna (1874) 21 Wall. 558, 22 L. Ed. 654.